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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION**

**IN RE GOOGLE PLAY STORE
 ANTITRUST LITIGATION**

Case No. 3:21-md-02981-JD

THIS DOCUMENT RELATES TO:

*In re Google Play Consumer Antitrust
 Litigation*, Case No. 3:20-cv-05761-JD

State of Utah et al. v. Google LLC et al.,
 Case No. 3:21-cv-05227-JD

**PARTIES' JOINT STATEMENT RE:
 PROPOSED PLAN TO PROVIDE
 NOTICE OF PENDENCY AND
 OPPORTUNITY TO OPT-OUT**

[PURSUANT TO COURT ORDER, DKT.
 NOS. 330 AND 354]

Judge: Hon. James Donato

1 On November 28, 2022, the Court certified a multi-state consumer class pursuant to Fed. R.
2 Civ. P. 23(b)(3), and ordered: “[t]he parties are directed to jointly file by January 20, 2023, a
3 proposed plan to give notice to the certified class and an opportunity to opt out.” Case No. 3:20-cv-
4 05761, Dkt. No. 330. On January 19, 2023, the Court extended that filing deadline to January 27,
5 2023. Dkt. No. 354.

6 Over the course of December 2022 and January 2023, attorneys for the certified class met
7 with representatives of the State Attorneys General (“State Plaintiffs”) and with counsel for
8 Defendant Google LLC (“Google”) to discuss a proposed plan for notice and an opportunity to opt
9 out. For purposes of clarity, convenience, and cost-effectiveness, Consumer Plaintiffs and State
10 Plaintiffs collectively propose nationwide forms of notice that would provide notice to class
11 members in the certified states and to residents of the states and jurisdictions on whose behalf the
12 State Plaintiffs’ *parens patriae* actions are being prosecuted. This notice would inform all affected
13 consumers of the pendency of the litigation and provide an opportunity to opt out of either or both
14 actions. Unlike Google’s proposal for separate notices, a single nationwide notice is more cost
15 efficient, provides greater clarity about the pendency of the actions, and avoids confusion that may
16 occur with two, separate forms of notice being sent out. More specifically, a joint nationwide notice
17 alerts consumers that, depending upon the “legal address” used when they made a qualifying
18 purchase during the relevant period, they may be part of both the certified class and the *parens*
19 *patriae* actions and can select to opt out of one or both of the actions if they choose. Google’s
20 proposal for separate notice forms does not inform consumers about this option and, thus, creates
21 confusion rather than lessen it.

22 Draft proposed forms joint Summary Notice and Long-Form Notice, collectively prepared
23 by Consumer Plaintiffs and the State Attorneys General and circulated previously to Google, are
24 attached as **Exhibits A** and **B** hereto.

25 Google disagrees. The Court instructed the parties to file a “proposed plan to give notice to
26 the certified class and an opportunity to opt out.” Dkt. No. 330 at 27. The plan proposed by
27 Consumer Plaintiffs and State Plaintiffs, however, needlessly complicates the notice process and
28 will likely to lead to confusion among consumers as to (1) whether they are members of the certified

class, (2) whether the claims are being brought on behalf of members of the certified class (versus those brought by State Plaintiffs), and (3) consumers’ ability to opt out of either the certified class or State Plaintiffs’ action, rather than both. While some notice is required for State Plaintiffs’ *parens patriae* claims, separate notices will reduce any potential for confusion as nearly all consumers will only get notice for one action or the other depending on whether they fall in the certified class or if State Plaintiffs claim to represent them.

Irrespective of which forms of notice the Court adopts, the Parties have agreed to issue direct notice by email, and publication notice by *PR Newswire Online* and via a dedicated notice website. For direct email notice, a notice administrator will use data provided by Google, which includes names, unique anonymized Google account IDs, the state or territory recorded in Google’s transactional data at the time of purchase based on the “legal address” in a consumer’s Google payment profile, and email addresses. State Plaintiffs also propose to provide notice to affected consumers on their respective State Attorney General websites.

I. The Proposal for Nationwide Notice of Pendency

A. Consumer Plaintiffs’ and State Plaintiffs’ Joint Position

Consumer Plaintiffs and State Plaintiffs join in a proposal for an order adopting a plan to provide notice of the pendency of the litigation on a nationwide basis. A nationwide proposed notice plan provides clarity, certainty, and cost-savings with a joint form of notice to class members in the certified states and to residents of the states and jurisdictions from which the State Plaintiffs’ *parens patriae* actions are being prosecuted, informing them of the pendency of the litigation and providing them an opportunity to opt out. In this way, a single nationwide notice plan adheres to the due process requirements of Federal Rule of Civil Procedure 23 and Title 15 U.S.C. § 15c of the Clayton Antitrust Act, both of which set forth standards for giving notice of pendency of class action/*parens patriae* litigation and providing opportunities to opt out.

A single nationwide notice plan provides clarity to affected consumers, either members of the class or residents of the jurisdictions prosecuting *parens patriae* actions. As the Court observed in its November 28, 2022 class certification order, “the government and private actions” here “are marching arm-in-arm toward a common victory over Google. There claims are just about the same,

the evidence will be the same, and all indications in the record are that their interests are well-aligned.” Dkt. 330 at 25. A joint form of notice informs all potentially affected consumers of the alignment in the claims and evidence. This sort of joint notice is routine in situations where related private class and government enforcer antitrust actions are settled and require court approval. In those instances, courts typically order that a single, joint form of notice be directed to all consumers who may be affected by the resolution – not two. *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827-SI (N.D. Cal.), Dkt No. 4688 (Jan. 26, 2012), and Dkt. No. 6141 (July 12, 2012) (preliminarily approving consumer plaintiff and related government *parens patriae* antitrust settlements, and approving joint forms of Summary and Long-Form Notices of Settlements,); *In Re: Electronic Books Antitrust Litigation*, No. 1:11-md-02293-DLC (S.D.N.Y.), Dkt. No. 597 (April 2, 2014) (“*E-Books*”); and *In re Disposable Contact Lens Antitrust Litigation*, No. 94-MDL-1030-J-20A, 3:97-cv-00861-HES (M.D. Fla.), Dkt, No. 918 (Sept. 20, 2000) (same) (“*Disposable Contact Lens*”).

A single, joint nationwide notice avoids potential confusion that may arise from dual or sequential forms of notice concerning the pendency of the same litigation—an especially important consideration, here, as Google’s records may reflect that a particular consumer had a qualifying transaction in more than one jurisdiction. Nationwide notice, as Consumer Plaintiffs and State Plaintiffs propose here, offers affected consumers one comprehensive source of information in a single joint form of notice. If any consumer has questions about potential claims, they can conveniently contact one notice provider, who can answer or route questions to counsel as appropriate, as opposed to two, which at best may result in some duplicative communications and at worst inconsistent answers about claims.

Additionally, a single nationwide notice program promotes certainty. The Court has now set a joint trial date of November 6, 2023, for the government and certified class actions. *See* Dkt. No. 421. Consumers in the certified class, together with those in the states and jurisdictions covered by the *parens patriae* actions, have a due process right to be informed of the pendency and course of the litigation and its trial date, and to be provided with an opportunity to opt out of the litigation. *See* Fed. Rule Civ. P. 23(c)(2)(B); 15 U.S.C. § 15c(b)(1), (2). A joint, nationwide notice offers a

1 single timeline for all affected consumers to opt out and gives everyone certainty as to the universe
2 of opt outs going into trial.

3 Finally, a single nationwide notice program offers cost efficiencies. While the agreed-upon
4 proposed mechanisms for providing notice are all electronic (including, at a minimum, direct email,
5 website publication, and related internet-based notice), it is cheaper for a notice administrator to
6 send a single nationwide notice directed to all consumers affected by these consolidated actions,
7 than it is to send to two separate sets of notice – one set for the Consumer Plaintiffs and another set
8 for the State Plaintiffs. According to preliminary notice estimates obtained by Consumer Plaintiffs,
9 issuing two separate forms of notice will cost tens of thousands of more than having the notice
10 provider issue a single, nationwide notice. *See* Declaration of Consumer Plaintiffs’ Liaison Counsel,
11 Elizabeth C. Pritzker (“Pritzker Decl.”), at ¶ 7. Such cost savings enhance the value of any potential
12 recovery at the end of the litigation (either litigated or through settlement) to the greatest extent
13 possible.

14 B. Google’s Position

15 The proposal by Consumer Plaintiffs and State Plaintiffs will lead to more confusion, not
16 less. This confusion is entirely of Plaintiffs’ own making. Although Consumer Plaintiffs filed a
17 complaint seeking to represent a nationwide class, they later entered into a Joint Prosecution
18 Agreement (“JPA”) with State Plaintiffs and sought to certify a narrower class of 17 states and
19 territories. Under the proposed joint notice, Consumer Plaintiffs and State Plaintiffs divide who
20 they represent based on the address recorded in Google’s database at the time an app or IAP was
21 purchased. *See* Ex. B. This raises a series of potential problems that a joint notice would exacerbate.

22 Because defining who is representing who is based on the “legal address” associated with an
23 individual’s Google payment profile at the time of purchase, a joint notice would require a consumer
24 to try to figure that out herself, even though Google is willing to provide data that already is based
25 on that determination. For example, if an individual made some purchases in 2018 when her “legal
26 address” in her Google payment profile was in Georgia, then she is part of the certified class as to
27 those purchases, even if she later moved to, and currently resides in, Utah. Conversely, if another
28 individual made purchases in 2018 when his “legal address” in his Google payment profile was in

Utah, then State Plaintiffs claim to represent him, even if he later moved to Georgia.¹ Under a joint notice, individuals in this example would need to determine whether they are represented by Consumer Plaintiffs or State Plaintiffs – assuming that those individuals could even determine what their Google payment profile “legal addresses” were at the time of their purchases – to decide whether to opt out. A joint notice would force this determination on the part of the consumer even though Google already has data regarding the state associated with that consumer’s purchase.

While Google takes no position on whether the division proposed by Consumer Plaintiffs and State Plaintiffs is the correct way to divide consumers between the two cases, separate notices alleviate any potential confusion by taking out any guesswork regarding which action governs a consumer’s claim. Providing notice to a consumer only if Google’s data associates his or her purchase with one of the 17 states or territories in the certified class removes any doubt as to whether that consumer is a class member as Consumer Plaintiffs have now defined the class. Similarly, providing a separate notice for State Plaintiffs’ action would remove any doubt among the recipients as to whether State Plaintiffs contend that they are represented for those purchases. To the extent a consumer is covered by both actions based on how Consumer Plaintiffs and State Plaintiffs have now divided the claims – Google preliminarily estimates that this overlap is a tiny fraction (i.e., less than 1%) – they would get two notices and thus understand they are covered by both actions for different purchases. It would be far more challenging for consumers provided with a joint notice to first determine who represents them, and then to decide whether or not they wish to opt out. Moreover, any consumers who are represented by both Consumer Plaintiffs and State Plaintiffs may additionally need to navigate correctly opting out of one litigation and not the other. This additional work on the part of consumers would not be required if separate notice is provided.

Consumer Plaintiffs and State Plaintiffs cite three cases where Courts approved joint notice in the settlement context, where there was no indication that class members and individuals represented by the States were in different positions vis-a-vis the settlement, so there was less risk

¹ This example is based on how Consumer Plaintiffs and State Plaintiffs have divided claims, but should not be taken as Google endorsing this division. For the avoidance of doubt, Google is not waiving any argument at this time as to whether State Plaintiffs have standing in their capacity as *parens patriae* to represent individuals who no longer reside in the Plaintiff states.

1 of any fallout from an individual being confused as to who represented her. But Consumer Plaintiffs
 2 and State Plaintiffs do not cite any precedent for joint notice prior to settlement, simply claiming
 3 below that “it is indubitably more valuable for consumers to receive joint notice of a lawsuit even
 4 earlier” than settlement. That statement ignores the potential for confusion from a joint notice and
 5 potential fallout if an individual incorrectly determines which case she belongs to, and the cases
 6 diverge at a later stage. Any current alignment between Consumer Plaintiffs and State Plaintiffs
 7 does not resolve the issue. While Consumer Plaintiffs and State Plaintiffs may be currently aligned,
 8 the case is ongoing, and with over ten months left until trial, the parties may yet diverge in their
 9 litigation or settlement strategy. A joint notice now only heightens the risk of complications if those
 10 strategies diverge at a later stage.

11 Moreover, in *TFT-LCD*, the damages class consisted of consumers in 24 states while the
 12 *parens patriae* action was brought by eight Attorneys General on behalf of consumers in their
 13 respective states, which were also part of the 24 states that were covered by the certified class. In
 14 other words, there was complete overlap between consumers represented by the States and the
 15 certified class, and thus no opportunity for confusion. *In re TFT-LCD (Flat Panel) Antitrust*
 16 *Litigation*, No. M 07-1827-SI (N.D. Cal.), Dkt. No. 4688 (Jan. 26, 2012) at Ex. A (notice describing
 17 the “24 states” that comprised the damages classes to include “AR, CA, FL, ... MI, ... MO, ... NY,
 18 ... WV and WI” and that the “Attorney General of Arkansas, California, Florida, Michigan,
 19 Missouri, New York, West Virginia and Wisconsin are participating in these Settlements to resolve
 20 related claims arising from the same allegations in the class actions: (1) on behalf of state residents
 21 under the doctrine of *parens patriae*...”). Additionally, “[a]ny timely request for exclusion received
 22 from an IPP class member shall be deemed also to be an election of exclusion from such state’s
 23 *parens patriae* claims (if applicable), and vice-versa.” *Id.* at 5. Given the overlap in *TFT-LCD*
 24 between class members and consumers represented by the States, there was no risk of confusion
 25 from a joint notice as there is here.

26 Finally, Consumer Plaintiffs and State Plaintiffs claim that separate notices will cost “tens
 27 of thousands more” than a single nationwide notice. While Google is sensitive to the costs of notice
 28 and how it may affect any recovery by consumers – even in a case where Plaintiffs are claiming

billions in damages – the risk to that recovery arising from additional costs to resolve any confusion arising from a joint notice is likely to be much greater. For example, the Court may be presented with issues related to individuals who improperly tried to opt out of one case even though they are represented in the other. Or an individual may later claim she was not adequately informed of her right to opt out of the class because she thought she was represented by State Plaintiffs but would like to opt out after the deadline. Dealing with these issues will require both attorney and Court resources. Conversely, separate notices take the guesswork out of the equation and provide more certainty as to which action any individual belongs.

II. The Parties’ Respective Positions Re: Notice Language

A. Consumer Plaintiffs’ and State Plaintiffs’ Position

Consumer Plaintiffs and State Plaintiffs jointly propose nationwide forms of Summary Notice and Long-Form Notice in the forms attached as **Exhibits A** and **B**, hereto. These forms of notice conform to the mandates of Rule 23 and the requirements of due process. Rule 23 requires “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Rule 23 also provides that notice can be made by “United States mail, electronic means, or other appropriate means.” Fed. R. Civ. P. 23(c)(2)(B). The Clayton Antitrust Act, 15 U.S.C. § 15c, requires that notice be given to consumers in antitrust *parens patriae* actions brought by States Attorneys General, and authorizes notice by publication or by any other means the Court deems appropriate to satisfy due process. 15 U.S.C. § 15c(b)(1). Although the Clayton Act does not set forth a specific standard for achieving due process, federal courts in this District have approved procedures and standards used in class actions under Rule 23. *See, e.g., California v. eBay, Inc.*, No. 5:12-cv-05874-EJD, 2015 WL 5168666 at *2 (N.D. Cal. Sept. 3, 2015); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827-SI, 2013 WL 1365900 at *4 (N.D. Cal. Apr. 3, 2013). In *TFT-LCD*, as *E-Books* and *Disposable Contact Lens*, all antitrust cases, the courts approved a joint notice of settlement sent on behalf of both the consumer class and the state attorneys general bringing *parens patriae* actions. However, it is indubitably more valuable for consumers to receive joint notice of a lawsuit even earlier—like now, months before trial—as they can have more time to meaningfully consider whether to opt-out and proceed

1 independently.

2 Here, the proposed nationwide Summary Notice and Long-Form Notice include all of the
3 information required under Rule 23(c)(2)(B): the nature of the action, the class definition and *parens*
4 *patriae* claim definition, a summary of the pending claims, that a consumer may enter an appearance
5 through an attorney, that the Court will grant timely exclusion requests, the time and manner for
6 requesting exclusion, and the binding effect of a final judgment. *See Exhibits A and B.* The
7 proposed Summary Notice provides summary information and a hyperlink to a dedicated notice
8 website, which contains the long-form notice and other case-related information, such as the
9 Consumer Plaintiff and State Plaintiff complaints and the Court’s order certifying the Consumer
10 Plaintiff class. *See Exhibit B.* The forms of notice thus include all information necessary for
11 consumers to make informed decisions relating to the actions.

12 The current proposed forms of Summary Notice and Long-Form Notice contain language
13 that is intended to guide consumers on this issue: they advise that membership in either the certified
14 class or the *parens patriae* actions may be determined by the address identified in the consumer’s
15 payments profile on file with Google at the time of purchase. *See Exhibits A and B.* Because the
16 address in the consumer’s profile is being used to determine the location of any purchase, the notices
17 advise that certain consumers may be part of both the certified class and the *parens patriae* cases
18 (for example, if the consumer moved and changed her Google Play payments profile address during
19 the relevant period). There is no potential duplicative recovery for any consumer, however, as
20 Google’s records link the consumer’s payments profile “legal address” to a Google Play Store
21 purchase at the time of the purchase.

1 While Consumer Plaintiffs do not believe a change in the class definition set forth in the
 2 Court's November 28, 2022 certification order is necessary, if the Court is inclined to specify that
 3 the location of one's qualifying purchase is determined by the address listed in consumers' Google
 4 payments profile at the time of purchase, Plaintiffs have no objection to this change.²

5 Google argues, below, that the forms of notice must contain information concerning the
 6 existence and certain terms of the Joint Prosecution Agreement. This is unnecessary. The Court
 7 previously addressed and rejected Google's argument regarding any potential conflict between
 8 Consumer Plaintiffs and State Plaintiffs, stating: "...the Court has broad discretion over fee awards,
 9 and ample authority to investigate and respond to any concern" regarding issues of conflict, or the
 10 any award of class counsel's fees in the event of settlement or after trial. Dkt. No. 330 at 27. The
 11 forms of Summary Notice and Long-Form Notice that Consumer Plaintiffs and State Plaintiffs
 12 propose clearly inform consumers which attorneys represent consumers in which states. The notices
 13 also truthfully inform consumers that any attorneys' fee award made to the Consumer Plaintiffs,
 14 whether by settlement or after a trial, will be subject to Court approval. This is consistent with due
 15 process and Rule 23's requirements.

16 B. Google's Position

17 As described above, Google objects to a joint notice and believes that separate notices will
 18 reduce consumer confusion. Additionally, Google objects to Section 6 of the proposed long form
 19 notice (Ex. B). Whereas Section 5 of the notice appropriately notes that Class Counsel may request
 20 fees and "the fees and expenses awarded by the Court would be either deducted from any money
 21

22 ² As a potential example on this point, to the extent specification is needed, the certified class
 23 definition might read:

24 All persons who, on or after August 16, 2016 to the present, paid for an app through the Google
 25 Play Store or paid for in-app digital content (including subscriptions or ad-free versions of
 26 apps) through Google Play Billing using a Google payments profile "legal address" located in
 27 the following U.S. states and territories:

28 Alabama, Georgia, Hawaii, Illinois, Kansas, Maine, Michigan, Ohio, Pennsylvania, South
 Carolina, Wisconsin, Wyoming, American Samoa, Guam, Northern Mariana Islands,
 Puerto Rico, and the U.S. Virgin Islands.

1 obtained for the Class or be paid separately by Google,” Section 6 of the notice, which describes the
2 “State Attorneys General Representatives and Counsel” makes no mention of the JPA or the fact
3 that Class Counsel may also request, and be awarded fees that are deducted from any money
4 obtained for consumers represented by State Plaintiffs. *See* JPA § IV (Dkt. No. 250-3) (noting that
5 under the agreement “Class Counsel may make an application to the Court for an award of attorneys’
6 fees and reimbursement of litigation expenses from any recovery created by resolution of the
7 Covered Claims [the *parens patriae* claims brought by State Plaintiffs], whether by settlement,
8 verdict or judgment”). Google believes that such notice must be provided so consumers in those
9 states can make an informed decision as to whether they should opt-out.

10 Google’s objection to Section 6 has nothing to do with a potential conflict between
11 Consumer Plaintiffs and State Plaintiffs. Rather, informing consumers that State Plaintiffs claim to
12 represent that Class Counsel may seek “attorneys’ fees and reimbursement of litigation expenses
13 from any recovery” of their claims, even though they are represented by State Plaintiffs, will help
14 inform their decision on whether or not to opt-out. Providing that information in the notice now will
15 avoid any complaints from consumers that they were given inadequate notice if Class Counsel later
16 apply for any such fees from any “recovery created by resolution” of the *parens patriae* claims.

17 With respect to the class definition, Google believes the class definition should not be
18 changed at this time.

19 Except as described above, Google takes no other position on the wording of either the long-
20 form or short-form notices.

21 **III. The Parties’ Positions Re: Notice Mechanisms**

22 The Parties have conferred and generally agree to a proposed notice plan that will include
23 direct notice by email, publication notice by *PR Newswire Online* and via a dedicated notice website.
24 State Plaintiffs also propose to provide notice to affected consumers on their respective State
25 Attorney General websites.

26 For direct email notice, a notice administrator will use data provided by Google, which
27 includes names, anonymized unique Google account IDs, state or territory information based on
28 their Google Play payment profiles at the time of purchase and email addresses. This data suggests

there are approximately 21 million class members in the seventeen states and jurisdictions that fall within the class definition (*see* Dkt. No. 330 at 27) and approximately 100 million consumers nationwide. Pritzker Decl., ¶¶3, 7. While direct notice is not required in all cases, *see Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1129 (9th Cir. 2017), here it is the best notice practicable because the notice provider will have contact information for nearly every consumer and can send direct notice on a nationwide basis electronically and affordably. Electronic notice by email is routinely used in technology, data privacy, and other class actions to provide notice to affected class members and has been held to satisfy due process and Rule 23. *See, e.g., In re Facebook Internet Tracking Litigation*, No. 5:12-md-02314-EJD, Dkt. No. 241 (N.D. Cal., March 31, 2022); *Taylor v. Shutterfly, Inc.*, No. 5:18-cv-00266, 2021 WL 5810294 at *2 (N.D. Cal., Dec. 7, 2021); *Cottle v. Plaid, Inc.*, No. 20-cv-3056-DMR, 2021 WL 541525 at *5-6 (N.D. Cal., Nov. 19, 2021); *Norcia v. Samsung Telecommunications America LLC*, No. 14-cv-00582-JD, 2021 WL 3053018 at *2 (N.D. Cal., July 20, 2021); *In Re USC Student Health Center Litigation*, No. 2:18-cv-04258-SVW-GJS, Dkt. No. 148 (C.D. Cal., June 12, 2019); *Cohorst v. BRE Properties, Inc.*, No. 3:10-cv-2666-JM-BGS, 2011 WL 7061923 at 2 (S.D. Cal., Nov. 14, 2011).

IV. The Parties' Positions Re: Timing of Notice

A. Consumer Plaintiffs' and State Plaintiffs' Position

For the orderly progression of this MDL, notice of pendency and consumers' opt out period must be completed ahead of the November 6, 2023 trial date. Accordingly, Consumer Plaintiffs and State Plaintiffs propose that the Court direct that notice of pendency go out by March 6, 2023. This is just eight months ahead of the trial date and provides affected consumers an appropriate amount of time to consider their legal rights and to decide whether to opt out ahead of trial.

Google's proposal to stay dissemination of notice pending Google's 23(f) petition, on the other hand, unnecessarily cramps the time period in which affected consumers may exercise their opt out rights ahead of trial. Google also has failed to meet its burden for any requested stay. Petitions appealing a district court's certification order pursuant to Rule 23(f) do not automatically stay the proceedings, unless the district court or the court of appeals so orders. "In deciding whether to stay this action, the following four factors must be weighed: (1) likelihood of success on the merits

of the appeal; (2) harm to defendant in the absence of a stay; (3) harm to plaintiffs if stayed; and (4) public interest. The first two factors are the ‘most critical.’” *Hernandez v. Wells Fargo Bank, N.A.*, No. C 18-07354 WHA, 2020 WL 10689800, at *1 (N.D. Cal. Mar. 19, 2020) (citing *Leiva-Parez v. Holder*, 640 F.3d 962, 964-70 (9th Cir. 2011) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009))). Google, the party requesting a stay, bears the burden of showing the circumstances warrant a stay. *Ibid* (citing *Nken* 556 U.S. at 433-44).

Here, Google’s Rule 23(f) appeal is based upon arguments made and rejected at class certification: an argument that presents a mere disagreement with the determinations in the Court’s class certification does not, in and of itself, satisfy Google’s “likelihood of success on the merits” burden. *Hernandez*, 2020 WL 1068900 at *1 (denying defendant’s request for stay pending determination of its Rule 23(f) petition); *see also Rainbow Bus. Sols. v. Merch. Servs., Inc.*, No. C 10-1993 CW, 2014 WL 1783945, at *2 (N.D. Cal. May 5, 2014) (same). Nor can Google establish a likelihood of irreparable injury if the stay is denied or that a stay is in the public interest. There is substantial prejudice to Consumer Plaintiffs and State Plaintiffs if dissemination of notice is stayed, however. A trial date has been set for this entire multi-district litigation and the Parties’ trial planning is already underway. A stay is not warranted. *See Garvey v. Kmart Corp.*, No. C 11-02575 WHA, 2012 WL 12919626, at *1 (N.D. Cal. Aug. 22, 2012) (denying request for stay pending Rule 23(f) appeal, noting that the parties’ trial preparation is necessary and already underway).

B. Google’s Position

Google requests a modest stay of any dissemination of class notice while Google’s 23(f) petition is pending in order to avoid the unnecessary expense, confusion and disclosure of class members’ contact information that would result if the Court’s class certification order is reversed. Stays of class notice are regularly granted while 23(f) appeals are pending, and it is Google’s position that a stay should thus be granted in this case, but if the Court believes this issue should be raised in a separate motion, Google will do so.

To be clear, Google is not seeking to stay the entire case, or even seeking to stay consideration of the form of notice. Rather, it only seeks a short stay of class notice distribution. None of Plaintiffs’ cases reject a stay of class notice, as all of them are about a complete stay of a

1 case while a 23(f) petition was pending. *Hernandez* and *Garvey* specifically involve situations
 2 where the issue of premature class notice was already moot. *Hernandez*, 2020 WL 10689800, at
 3 *1-2 (finding dispute over class notice was moot); *Garvey*, 2012 WL 12919626, at *1 (noting class
 4 notice had already been sent). Finally, *Rainbow* actually *supports* Google’s position: despite
 5 rejecting a stay of the whole case, the court stated that it “will not order any class notice to be sent
 6 until after the Ninth Circuit has ruled on Defendants’ Rule 23(f) petitions.” *Rainbow Bus. Sols. v.*
 7 *Merch. Servs., Inc.*, No. C 10-1993 CW, 2014 WL 1783945, at *2 (N.D. Cal. May 5, 2014).

8 The *Nken* test for granting a stay considers (1) the likelihood of success on the merits; (2)
 9 whether “irreparable harm” to the movant “is probable” absent a stay; (3) whether the stay will
 10 “substantially injure” the non-movant; and (4) whether the “stay is in the public interest.” *Leiva-*
 11 *Perez*, 640 F.3d at 964-970. Although “[t]he first two factors . . . are the most critical,” “so long
 12 as a certain threshold showing is made on each factor,” the court should remain “flexible” and apply
 13 a “general balancing approach” in determining whether a stay is warranted. *Id.* at 964, 966 (quoting
 14 *Nken*, 556 U.S. at 434); see *id.* at 971 (“so long as the [movant] has made the threshold showing that
 15 irreparable harm is probable absent a stay, we continue to weigh the relative equities”). Here, a
 16 limited stay is warranted under these factors.

17 A movant meets the first factor by showing it has raised “serious legal questions” in its Rule
 18 23(f) petition. See *Whitman v. State Farm Life Ins. Co.*, 2021 WL 5824572, at *1 (N.D. Cal. Dec.
 19 8, 2021). Here, Google has raised three serious legal questions in its 23(f) petition, including: the
 20 rigorous analysis required to determine when the presence of uninjured class members prevents class
 21 certification, whether an antitrust injury model that does not account for independent variables
 22 affecting whether a plaintiff is uninjured can support class certification, and whether individualized
 23 damages issues can prevent class certification. Irreparable injury is probable given the risk of
 24 premature notice to over 20 million class members and the potential for confusion that would arise
 25 if there is a change to the class definition or decertification. See *Bally v. State Farm Life Ins. Co.*,
 26 No. 18-CV-04954-CRB, 2020 WL 3035781, at *5 (N.D. Cal. June 5, 2020) (“courts have stayed
 27 class notice while allowing the rest of the litigation to proceed because of the specific risks posed
 28 by premature notice”); *Brown v. Wal-Mart Stores, Inc.*, No. 5:09-CV-03339-EJD, 2012 WL

5818300, at *4 (N.D. Cal. Nov. 15, 2012) (“Should the Ninth Circuit take Defendant’s appeal, there is a likelihood that the court will have to modify or decertify the class after class notice has issued. Such a result would require the issuance of a second curative notice to the class, perhaps many months or more after the initial class notice was disseminated. Considering the class in this case is estimated to exceed 22,000 individuals, a curative notice would not be sufficient to stem the confusion that would arise in the event of a change to the class definition or decertification of the class altogether.”); *Fernandez v. RentGrow, Inc.*, No. CV JKB-19-1190, 2022 WL 1782641, at *3 (D. Md. June 1, 2022) (collecting cases); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 286 F.R.D. 88, 94 (D.D.C. 2012). *Cf.* Manual Complex Lit. § 21.28 (4th ed.) (“If the appeal is from a grant of certification, the district court should ordinarily stay the dissemination of class notice to avoid the confusion and the substantial expense of renotification that may result from appellate reversal or modification after notice dissemination.”).

The Court has now set trial for November 6, 2023 (Dkt. No. 421), which provides adequate time to wait for the Ninth Circuit’s ruling on the 23(f) petition and then, if necessary, provide adequate notice to the class. Thus, there is no harm to Consumer Plaintiffs from the stay and the public interest weighs in favor of staying notice while the 23(f) petition is pending given the likelihood of confusion.

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E-FILING ATTESTATION

I, Karma Giulianelli, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that the signatory identified above has concurred in this filing.

/s/ Karma Giulianelli

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